



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for May 5, 2023**

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#### **BOARD DECISIONS**

**Appellant:** Jeremiah Timothy White  
**Agency:** Department of the Army  
**Decision Number:** [2023 MSPB 17](#)  
**Docket Number:** AT-0752-20-0508-I-1  
**Issuance Date:** May 3, 2023  
**Appeal Type:** Adverse Action

#### **RETROACTIVITY DUAL STATUS TECHNICIAN**

The agency appointed the appellant to a position as a “dual status” technician under 32 U.S.C. § 709. A dual status technician, like the appellant, “is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.” 32 U.S.C. § 709(e). Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2017 (2017 NDAA), Pub. L. No. 114-328, § 512(a), 130 Stat. 2000, 2112-13 (2016), the statutory scheme did not allow for Board appeals challenging adverse actions from dual status technicians. The 2017 NDAA amended section 709 by extending Board appeal rights to dual status technicians in certain circumstances.

After allegedly experiencing performance issues, the agency presented the appellant with the following three employment options: a demotion, extended

leave without pay, or a resignation. At the appellant's election, the agency demoted him effective December 14, 2014. The appellant appealed his demotion. The administrative judge dismissed the appeal for lack of jurisdiction because, at the time of the action, the Board lacked the authority to review adverse action or involuntary adverse action appeals from dual status technicians appointed under section 709. The administrative judge further found, *inter alia*, that the aforementioned amendments to section 709 did not apply retroactively. The appellant filed a petition for review of the initial decision.

**Holding: The administrative judge correctly found that the amendments to section 709 of the 2017 NDAA did not apply retroactively and dismissed the appeal for lack of jurisdiction.**

1. While the Board agreed with the administrative judge's findings, it modified the initial decision to supplement the analysis on retroactivity.
2. Applying the analytical framework for determining whether a law should be given retroactive effect as set forth in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), the Board considered whether Congress clearly intended for the amendments to apply retroactively and, if not, whether they would have a retroactive effect, i.e., whether they would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.
3. The Board determined that the 2017 NDAA was silent as to the retroactivity of the amendment and that the amendment's grant of Board appeal rights would increase the agency's liability for past conduct. The Board also found no basis for concluding that the amendment clarified existing law. Therefore, the Board agreed that the amendment was not retroactive and could not apply to this appeal.
4. As a result, the Board agreed with the administrative judge's application of section 709 as it existed prior to the enactment of the 2017 NDAA, which, as explained above, excepted adverse actions brought by dual status technicians from the Board's chapter 75 jurisdiction, including the action at issue here.

Accordingly, the Board denied the appellant's petition for review and affirmed the initial decision as modified.

### NONPRECEDENTIAL COURT DECISIONS

*Simpkins v. Merit Systems Protection Board*, No. [2023-1012](#) (Fed. Cir. May 3, 2023) (MSPB Docket No. DC-3443-22-0190-I-1) (per curiam): The petitioner

appealed the Board's decision that it lacked jurisdiction over his appeal of a letter from the Office of Personnel Management (OPM) explaining that OPM could not correct his final pay card from his employing agency after his separation. The court affirmed the Board's finding that the petitioner failed to nonfrivolously allege that OPM's action constituted an appealable suitability action, an employment practices violation, or a denial of restoration.

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